court. An attempt is also made to distinguish the principal case from the Lochner case on the ground that the emergency exception takes it out of the class in which that case is found and puts it in the class of *Holden* v. *Hardy,* supra, since the Utah statute there construed contained this exception. But doubt is thrown upon this view by the fact that Mr. Justice PECKHAM whose statement about the emergency exception in the Lochner decision is relied on in the principal case, himself dissented from the decision in *Holden* v. *Hardy.* One who reads the series of decisions wherein the question of hours of labor has been involved is inclined to agree with the dissent of Mr. Justice HOLMES in *Lochner* v. *New York, supra,* where he says: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." Professor Henry R. SEAGER writes in 19 POL. SCI. QUAR. 589, "the question of the constitutionality of a restrictive labor law is inseperably connected with the question of the wisdom of such a law." And another who has made a careful study of these decisions says: "What the courts actually do in cases in which they declare a law of this sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature, although they continually say that this is not the case." GOODNOW, SOCIAL REFORM AND THE CONSTITUTION, p. 247. It is now submitted that the economic theory referred to by Mr. Justice HOLMES is no longer controlling in the Supreme Court and that the principal case will be frankly affirmed on appeal. This will help to restore that court to its former position as the most progressive court in the country.

G. S. B.

THE CONSTITUTIONALITY OF THE NON-PARTISAN BALLOT.—A case of no little interest and one of considerable political significance, involving the constitutionality of the non-partisan ballot, recently came before the Supreme Court of Ohio for consideration. In *State ex rel. Weinberger* v. *Miller, et al,* (Ohio 1912), 99 N. E. 1078, proceedings were instituted to have declared as unconstitutional a law which provided for the election of judicial officers upon a non-partisan ballot, free from all distincive party marks or emblems, and which further provided that the names of the candidates should rotate in the order in which they were placed upon the ballots. The constitutionality of the law was attacked upon the ground that it added another provision to the qualification of an elector which was not prescribed by the constitution, in that it required a voter to be able to read in order to select the candidates for whom he wished to vote, thus adding an educational qualification. The Ohio constitution provides in § 1, article 5, that, "every male citizen of the United States of the age of 21 who shall have been a resident" (for a stated period) "shall have the qualification of an elector and be entitled to vote at all elections." A divided court, the judges standing three to two, upheld the validity of the law. The majority opinion was based upon the

grounds (1) that no greater hardship was imposed upon illiterates than had existed under the old form of ballot, (2) that the state afforded educational advantages for all, (3) that it did not require any greater amount of learning to mark the ballot than was contemplated by the constitution, and that as all voters were given an equal chance, the uneducated person here, as in all civil and social walks of life, must rest at a disadvantage.

The view taken by the court is in full accord with the present day tendencies for a re-organization of our entire election system, and this case no doubt marks the complete evolution of our ballot system. Apparently this is the first time the constitutionality of the non-partisan ballot has been called into question, as a research fails to reveal a case in which the precise point has been considered. The only case cited by the court in support of its stand is *Cook* v. *State,* 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183, where the statute provided that the names of all candidates should be printed upon one ticket and that each voter should select and mark his own ballot. In holding that the statute did not require such educational qualification as to render the law obnoxious to the constitution, the court said, "The framers of the constitution did not intend by its conference of the right to vote, to ignore an educational qualification in all respects. An ignorant exercise of the elective franchise was not contemplated. An illiterate can always find a friend to aid him and with little effort the unlettered voter can become as well acquainted with the printed name of his candidate as his face. This inconvenience to a part of the community must yield to the good of the whole —and it can not be urged that laws which secure the purity of the ballot abridge the privileges and immunities of the citizen." Another case of more recent date which goes to sustain the principal case is *State ex rel. Regan* v. *Junkin,* 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N.S.), 839. Here a non-partisan judiciary act was under consideration, which provided a special method for nominating judicial officers and prescribed that "no party name or designation shall be given upon any ballot to any candidate for said office." The law was held unconstitutional because of the method by which the nominations were to be made, and while the non-partisan ballot provision of the law was not attacked, yet both the majority and minority opinions sustained it, and Justice LETTON said, "The manner in which the names of the candidates shall appear on the single ballot, whether with or without party designation, is a matter entirely within the control and discretion of the legislature. * * * Political parties may or may not be recognized by the legislature in regulating the form of ballot, and there is no constitutional requirement which compels their notice." The court's discussion overlooked the point raised in the principal case relative to the education required to mark such a ballot; this may be accounted for by the provision found in the COMPILED STATUTES OF NEBRASKA, 1911, § 3383, which expressly provides that illiterates shall be assisted by election officials in marking their ballots.

Aside from the above cited cases there appears to be no pertinent precedent sustaining the view of the majority of the Ohio court. On the other hand there are innumerable authorities which on principle and construction seem to be in accord with the minority opinion.

"All regulations of the elective franchise must be reasonable, uniform and impartial—they must not have for their purpose directly or indirectly to deny or abridge the constitutional rights of the citizens to vote, or unnecessarily to impede its exercise." COOLEY, CONST. LIMIT. (7th Ed.) 907, And in *State ex rel. Attorney General* v. *Dillon,* 32 Fla. 545, 22 L. R. A. 124, the court said, "The authorities are uniform and abundant in support of the position that where the constitution has prescribed the qualifications of electors, it is not in the power of the legislature to take from or to add to such qualifications, or to injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right of suffrage guaranteed by the constitution." The case of *State* v. *Frear,* 142 Wis. 320, 125 N. W. 961, expressed the principle as follows; "Legislation on the subject of election is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself either directily or by rendering its exercise so difficult and inconvenient as to amount to a denial." And many authorities support this view. *Independence Party Nomination,* 208 Pa. 108, 57 Atl. 344; *State* v. *Superior Court,* 60 Wash. 370, 111 Pac 233, 140 Am. St. Rep. 925; *Morris et al.* v. *Powell,* 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326; *Kinneen* v. *Wells,* 144 Mass. 497, 11 N. E. 916, 57 Am. Rep. 105; *Yick Wo* v. Hopkins, 118 U. S. 356, 371, 6 Sup. Ct. 1064, 30 L. Ed. 220. The primary purpose of the non-partisan ballot is to secure independence in voting, which is commendable, yet it is quite obvious that the form of ballot prescribed imposes such a hardship upon the unlettered voter that it renders the exercise of his right, in the absence of assistance, so difficult and inconvenient as to amount practically to a denial, since the ability to read is an absolute prerequisite. It would seem that the constitutional grant of suffrage includes not only the mere right to cast a ballot but also the right to intelligently mark the same, as far as it is possible to do so. "Under our law the blanket ballot affords the voter, who may be unable to read the ballot from illiteracy, an opportunity to vote by securing assistance. If this right were not accorded the present election law would be unconstitutional." *Matter of Hopper* v. *Britt,* 203 N. Y. 144. And in *Rogers* v. *Jacobs, Mayor &c.,* 88 Ky. 502, 11 S. W. 513, where a statute requiring all voters to mark the ballot without aid was under consideration, the court said, "Such a provision practically deprives those unable to read or write of a free and intelligible choice, and in fact makes free suffrage as to them a matter of chance or accident. And thus while the interests of many are involved and should not be denied or jeopardized by nullifying the statute—yet we have no right to sanction any law that takes from a single human being his constitutional rights. And this section deprives illiterate persons of the opportunity and means of freely and intelligibly voting." Practically the same question came up in *Pearson et al.* v. *Board of Supervisors,* 91 Va. 322, 21 S. E. 483, where a ballot law was attacked as requiring an educational qualification contrary to the constitution. The court said, "There is no educational qualification prescribed by our constitution, and a person otherwise qualified to vote, no matter how ignorant he may be, is entitled to vote. * * * And if under cover of a law to regulate voting, a provision is introduced into the law which virtually establishes a test

of the qualifications of the voter, additional to those prescribed by the constitution, such provision transcends the power of the legislature and is null and void. The law is fair for the educated—with the ignorant voter, however, the case is different. It is obvious that one who from intellectual blindness is unable to read, is wholly incapable of voting without assistance. The law recognizes this and provides for it." While all the regulations for the purity of the ballot should be fostered, yet they should not destroy the main factor. As the court stated in *Page v. Allen,* 58 Pa. St. 338, "But this duty and right, inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle elements essential to the right itself might be invaded, frittered away, or entirely exscinded under the name or pretense of regulation, and thus would the natural order of things be subverted making the principle subordinate to the accessory."

The principle enunciated in these cases bears out the conclusion that there must be a limit to legislative encroachment upon the right of the illiterate to vote,—and by voting is meant marking as well as casting his ballot. Instead of making it more difficult for one to mark his ballot, efforts should be made to make the method more intelligible to all so far as is consistent with secrecy. "It is within the legislative power to provide for all regulations which are designed to secure and facilitate the exercise of the right of suffrage in a prompt, orderly and convenient manner." *Capen* v. *Foster,* 12 Pick. 485, 23 Am. Dec. 632; *Attorney General* v. *Common Council of Detroit,* 78 Mich. 545, 18 Am. St. Rep. 458. And party emblems have been one method of attaining this end." There should be some intelligent action upon the part of every voter—and to bring this possibility within the reach of each individual voter, the idea of party devices or emblems was resorted to for the purpose of enabling the illiterate voter to attain that end." *Fernbacher* v. *Roosevelt, et al,* 35 N. Y. Supp. 898.

From a review of the cases relative to legislative limitation upon the exercise of the elective franchise, the weight of authority seems to be that a reasonable and necessary restraint of the right of suffrage is permissible, but (with the exception of *Cook* v *State, supra,*) no authority goes so far as to hold that an illiterate can be indirectly deprived of his ballot because he is unable to read. Whether the view of the Ohio case should be sustained on principle would seem to rest upon the question as to whether an illiterate must mark his own ballot, or whether the election laws permit the unlettered to be assisted by the election officials. If an illiterate is to receive no assistance, under the above cited authority, the law is contrary to the general accepted rule. But if the Ohio statute permits officials to assist illiterates in marking their ballots, it can not be said that the uneducated voter is deprived of his right, and accordingly the court's view would be correct. The GENERAL CODE OF OHIO, 1910, § 5078, permits election officials to assist those, "unable to mark their ballots by reason of blindness, paralysis, extreme old age or other physical infirmities * * * apparent to the judges, but such assistance shall not be rendered for any other cause the voter may specify." § 5069 pro-

vides that if an elector defaces three ballots by accident or honest mistake, the judge shall deliver to him another ballot and help him mark it. And § 13294, provides that an election official who misleads an illiterate or blind voter, or an elector who is unable to prepare his ballot, or prepares a ballot for such an elector otherwise than as directed by him shall be fined. The court has never had occasion to determine whether or not under these sections of the statute an illiterate can be lawfully assisted by the election officers. But in *Wickham* v. *Coyner*, 30 Ohio Cir. Ct. Rep. 765, the court said in reference to § 5078 of the Code, "We are of the opinion that if the case required it we would hold that the direction that the judges should not render assistance to voters other than those afflicted with physical infirmities, is a limitation upon the right of the elector to cast his ballot and not warranted by the constitution." And in *Common Council* v. *Rush*, 82 Mich. 532, it was held in the absence of an express provision for assistance to illiterate voters in marking their ballot the right exists by implication.

On the other hand, the court of Tennessee in construing a similar statute, held in *Moore* v *Sharp*, 98 Tenn. 491, 41 S. W. 587, that the statute did not extend to include illiterate voters, saying, "The fact that a man can neither read nor write does not necessarily disqualify him from marking his ballot." There are three interpretations open to the court to adopt,—the Tennessee rule, that of *Wickham* v. *Coyner, supra,* or to declare that illiterates are included within the statute. In order to bring the principal case in line with the weight of authority, one of the last two named interpretations must be placed upon the statutes, otherwise the legislature in providing for the non partisan ballot, irrespective of the merits of the law, clearly overstepped its constitutional limitations according to the weight of authority. As was stated by Chief Justice DAVIS in the principal case in his dissenting opinion, "It may or may not be desirable to eliminate this class of voters, but the constitution does not disqualify them, and it is clearly not within the power of the legislature to do so." S. H. M.

THE RIGHT OF A MUTUAL BENEFIT ASSOCIATION TO INCREASE THE RATE OF ASSESSMENT UNDER A GENERAL POWER TO AMEND ITS CONSTITUTION AND BY-LAWS.—The courts agree in general that a reservation of power to amend the by-laws and constitution gives an association the right to make such amendments as will not impair the vested rights of its members. A conflict, however, arises among the authorities when they come to determine whether or not a vested right of the members has been impaired. Some courts hold that where an association reserves the general power to amend the by-laws and constitution, and one contracts with reference to such power, he has no vested right to have the rate of assessment remain the same as it was when he became a member or to receive the same benefits as were agreed upon at that time; and that under such reservations of power to amend the association has a right to make any reasonable change in its by-laws and constitution even though the rate of assessment or the benefits are materially altered. These courts hold that any change in the rate of assessment or the benefits to be received when necessary to preserve the life of the association is a reas-